

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SALVATORE PALMA, JR., individually	:	CASE NO. 1:18CV00294
and as administrator of the Estate of	:	
Palma Dominic Palma, <i>et al.</i>	:	
	:	
Plaintiffs,	:	JUDGE DAN AARON POLSTER
	:	
	:	PLAINTIFFS' TRIAL BRIEF
	:	
vs.	:	
	:	
	:	
DEPUTY MATTHEW JOHNS, <i>et al.</i> ,	:	
	:	
Defendants.	:	

Now come Plaintiffs, by and through counsel, and for their Trial Brief state as follows:

I. STATEMENT OF FACTS

On February 8, 2017, Vincent Palma was shot nine (9) times in the yard of his home by Deputy Matthew Johns. On that date, Deputy Johns received a call from dispatch advising that there was a call pending at 4394 South Ridge Road, Geneva Township. Prior to his arrival, Deputy Johns, was advised that there was an unwanted subject at that location who was "76", which is an indication that the individual has mental health issues. Police were originally contacted by Melissa Palma, Vincent's step-mother. There was a sibling dispute at the Palmas' residence between Vincent and his sister over a television remote. It was Melissa Palma's intention to have law enforcement take Vincent to the hospital for potential mental health services when she called 9-1-1.

Upon arrival, Deputy Johns drove into the Palmas' driveway, approximately 40 to 50 feet from the front of the house. Deputy Johns parked the vehicle and observed Vincent standing outside on the steps of the front porch. Deputy Johns exited his cruiser and walked toward the house, approximately ten to fifteen feet from his cruiser. Vincent began walking down the stairs of the porch as Deputy Johns began walking toward him. At this point in the encounter, Deputy Johns was 20 to 25 feet away from Appellant.

Salvatore Palma, Jr. and Melissa Palma were outside when Deputy Johns arrived at their home and observed Vincent walking down the front stairs and toward the driver's side of Deputy Johns' cruiser. Melissa Palma advised that Vincent was unarmed. During Vincent's encounter with Deputy Johns, Vincent did not make any verbal statements to Deputy Johns. At that point during the encounter, Deputy Johns did not observe a weapon. From across the hood of Deputy Johns' cruiser, and after hearing no response to his request to stop walking, Deputy Johns tased Vincent. As a result of the taser applications, Vincent landed in a puddle, in the corner of the yard. When Vincent fell to the ground after being tased, Vincent was positioned on his left side. There is no evidence that a weapon was observed at that time.

After Vincent was tased and fell to the ground, he got up and started going back to the house. Deputy Johns grabbed his baton and raised it over his head as if he was going to swing it at Vincent, but alleges he did not use it because Vincent turned away from him. Melissa and Salvatore observed that Vincent turned away from Deputy Johns to walk to the house.

Next, Deputy Johns unholstered his firearm and began to walk backward across the driveway and yard of the Palmas' property. Both Deputy Johns and Vincent continued to walk across the yard with a "ten-foot plus" gap in between them the entire time. Vincent continued to walk at the same "walking" pace throughout the entire encounter. During the time Vincent and

Deputy Johns were walking, Vincent did not lunge at Deputy Johns or make any verbal threats to Deputy Johns.

According to Deputy Johns, he unholstered his firearm and pointed it at Vincent as they were walking. As Deputy Johns and Vincent proceeded toward the middle of the yard, if at any time Deputy Johns stopped walking, Vincent would also stop walking. Despite the fact that Vincent had not reached out, lunged at, or made any threats, verbal or otherwise to Deputy Johns, Deputy Johns fired the first shot at Vincent. Melissa Palma testified that at the time Vincent was shot, both Vincent and Deputy Johns were stopped. Deputy Johns fired additional shots at Vincent. During the shooting, Vincent fell to the ground and Deputy Johns continued shooting him. No weapons were ever recovered, confirming that Vincent was unarmed throughout the encounter.

The Autopsy Report indicates that Vincent was shot nine (9) times. Of the nine (9) gunshot wounds, the direction of four (4) of the gunshots were downward. The projectile direction suggests that Vincent was on the ground when at least four (4) of the shots were fired and struck him. Thus, it is reasonable for one to conclude that Vincent was in a fetal position, on his hands and knees, or crawling when he was shot by Deputy Johns. The wound path analysis indicates that many of the gunshot wounds could have occurred while Vincent was on the ground or attempting to get back up after collapsing to the ground. Further, the large number of ground impacts and projectiles in the area of the shooting, are indicative of the shooter firing at a target individual who is not changing location to any significant extent.

It is the position of the Plaintiffs that Deputy Johns used excessive force against Vincent Palma during the encounter, violating his constitutional rights. It is the further position of Plaintiffs that Deputy Johns caused the wrongful death of Vincent Palma.

II. SYNOPSIS OF APPLICABLE LAW

A. Excessive Force – 42 U.S.C. § 1983

Plaintiffs' amended complaint sets forth a 42 U.S.C. § 1983 claim "imposes civil liability on those individuals who, acting under color of state law, deprive a citizen of, among other things, his federally guaranteed constitutional rights." *Baynes v. Cleland*, 799 F.3d 600, 607 (6th Cir. 2015). For this claim, Plaintiffs acknowledge that they must set forth facts that, when favorably construed, establish: (1) the deprivation of a right secured by the Constitution or laws of the United States; (2) caused by a person acting under the color of state law. *Id.* (citing *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir.2006)).

Plaintiffs submit that Deputy Johns deprived Vincent Palma of his right to be free from unreasonable seizure by subjecting him to the unjustified use of deadly force in violation of the Fourth and Fourteenth Amendments of the United States Constitution. Section § 1983, the federal civil rights statute under which Plaintiff Palma sues, provides that a person may seek relief in this court by way of damages against any person or persons who, under color of any state law or custom, subjects such person to the deprivation of any rights, privileges, or immunities secured or protected by the constitution or law of the United States. Authority: Hon. Edward J. Devitt, et al., Federal Jury Practice and Instructions (West) §165:10 – Generally. Plaintiffs allege, and the record reflects, that Defendant Johns applied to Mr. Palma, an unreasonable and unnecessary use of force when he shot and killed Mr. Palma.

The right to be free of the use of excessive force is also clearly established as it applies to taser use. The Sixth Circuit recognized in *Brown v. Chapman* that "an individual's right to be free from a taser is clearly established when the individual is not actively resisting arrest or is already detained." *Brown v. Chapman*, No. 15-3506, 2016 WL 683260 at *461 (6th Cir. Feb. 19,

2016)(collecting cases: *Thomas v. Plummer*, 489 Fed.Appx. 116, 126–29 (6th Cir.2012) (concluding that, as of 2009, an officer's use of a taser on a once-disobedient suspect who had stopped resisting violated clearly established law); *Kijowski v. City of Niles*, 372 Fed.Appx. 595, 600–01 (6th Cir.2010) (holding that officers violated clearly established rights when they dragged an unresisting man from his truck and tasered him); *Landis v. Baker*, 297 Fed.Appx. 453, 461–64 (6th Cir.2008) (finding that officers violated clearly established law by tasering a suspect who had previously grabbed a police officer but had since released him and was “no longer a threat to any of the officers” as he was “not belligerent or verbally resistant” and did not have a weapon)). Plaintiffs believe the evidence will show that Deputy Johns also violated clearly established law by tasering Mr. Palma when he was not a threat to the officer and did not have a weapon.

B. State Law Claim for Wrongful Death

Plaintiff has additionally raised a state law claims against Defendants for the wrongful death of Vincent Palma. Plaintiffs argue that Deputy Johns failed to exercise due care and acted in a willful and wanton and reckless manner while engaged in law enforcement functions and activities which culminated in the death of Vincent Palma. The Ohio Political Subdivision Tort Liability Act, Ohio Revised Code §2744 permits tort actions against municipal employees for actions taken with “malicious purpose, in bad faith, or in a wanton or reckless manner.” Ohio Rev. Code § 2744.03(A)(6)(b). The Ohio Supreme Court finds recklessness when the actors are “conscious that [their] conduct [would] in all probability result in injury.” *A.J.R. v. Lute*, 2020-Ohio-5168, 168 N.E.3d 1157, 1162. “Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct.” *Lute*, 1161 (citing *Anderson v.*

Massillon, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph four of the syllabus). Defendants are not protected by Ohio state law immunity for their conduct in tasing and shooting Mr. Palma, and Plaintiffs will submit jury instructions defining these elements. As the foregoing Summary of Facts demonstrates, Deputy Johns was aware that his actions were likely to, and did, result in injury to Mr. Palma when he used excessive force during their encounter.

III. EVIDENTIARY ISSUES

As a general matter, and as described above, the question for the jury in a Section § 1983 case alleging excessive force is whether Defendant engaged in objectively unreasonable conduct when he tased and shot Vincent Palma on February 8, 2017. Further, as described above, Plaintiffs also raise the state law claim of wrongful death. Plaintiffs have raised and briefed multiple evidentiary issues in their Motions in Limine. Plaintiffs reiterate the evidentiary issues below, renewing certain Motions in Limine (several that remain outstanding with the court) and offering several new Motions in Limine.

A. Any Potential Prior Bad Acts Evidence Is Not Probative of Plaintiff Vincent Palma's Knowledge or Intent on February 8, 2017

Plaintiff renews this Motion as the Court has reserved ruling on same. In response to the Order of this Court, the parties provided additional briefing on this issue via email to the Court.

Plaintiffs submit that any evidence of prior bad acts must be excluded at trial as there is no permissible purpose pursuant to Federal Rule of Evidence 404(b). The purpose of Rule 404(b) is to prevent a jury from “convict[ing] a ‘bad man’ who deserves to be punished not because he is guilty of the crime charged but because of his prior or subsequent misdeeds” and from “infer[ing] that because the accused committed other crimes, he probably committed the crime charged.”

United States v. Emmons, 8 F.4th 454, 473 (6th Cir. 2021) (citing *United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979)). Evidence that would be inadmissible solely for purposes of

demonstrating conformity with a character trait may be independently permissible for another 404(b) purpose; however, the admissibility of prior bad act evidence must be carefully analyzed to avoid subsuming the protections of Rule 404(b) in their entirety. In order to be relevant as “other acts” evidence, “the purpose for which the evidence is offered [must be] material or ‘in issue.’” *United States v. Emmons*, 8 F.4th 454, 474 (6th Cir. 2021). Certain prior bad act evidence becomes relevant only if it requires the jury to first conclude that the defendant likely acted in conformity with the bad character trait in the present instance. Such evidence runs afoul of Rule 404(b), and should not be presented to the jury.

Plaintiff submits that in this case any prior bad acts as it relates to Vincent Palma are not relevant and serve no permissible purpose.

B. References or Mentions of Prior Pleadings, Claims, or Dismissed Parties.

The amendment of the pleadings, claims, or dismissal of parties are irrelevant to issues the jury will be asked to decide in this case.

C. References or Mentions by Deputy Johns’ that he was justified in shooting/tasing Palma.

Plaintiff renews this Motion and asks the Court to reconsider its decision permitting Defendant Johns to testify whether he was justified in tasing and/or shooting Mr. Palma. This testimony should be excluded under Federal Rules of Evidence 402 and 403. Under the Fourth Amendment, an officer’s subjective opinions are irrelevant. Rather, objective facts are what matters. The substantial weight of Fourth Amendment jurisprudence consistently concludes that Fourth Amendment violations cannot be predicated on an officer’s subjective beliefs or opinions as to what the officer thought or believed a suspect might do. Consequently, courts analyze an officer’s use of force by asking whether it was “objectively reasonable” in light of the actual facts and circumstances confronting the officer, without regard to the officer’s beliefs or underlying

intent. *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1220 (10th Cir. 2005). Accordingly, Deputy Johns' subjective beliefs are irrelevant, potentially prejudicial, and should be excluded.

D. Contributory Fault Should not be Argued or Presented.

The Plaintiff acknowledges that this issue was deemed moot by the Court in based on Defendants' agreement in open court that no testimony or argument would be made suggesting contributory fault. However, it has become clear through further discovery that Defendants will likely attempt to introduce evidence that Palma was contributorily negligent based on alleged attempts on his part to commit suicide by cop. In light of this position, Plaintiffs renew their Motion and ask the Court to preclude any argument regarding the comparison of any fault of plaintiffs or any other non-party. Comparative fault principles do not apply in 1983 civil rights actions and would serve to confuse the issues in this matter. *Quezada v. County of Bernalillo*, 944 F.2d 710, 720 (10th Cir. 1991).

E. Conclusions and Opinions of Ohio Attorney General's Office.

Plaintiffs renew this motion to the extent that it does not appear clear from the Court's prior Order that a final decision on this issue was made.

Defendants may attempt to introduce evidence that the Ohio Attorney General's Office chose not to prosecute Deputy Johns for the purpose of swaying the jury's opinion regarding Deputy Johns' use of lethal force. However, such evidence should not be allowed because it is irrelevant to whether Deputy Johns violated Mr. Palma's Constitutional rights. Moreover, this evidence would improperly sway the jury's opinion by suggesting that because no criminal charges were brought, Deputy Johns used the proper amount of force. In another excessive force case, the court found that the District Attorney's decision not to file homicide charges against the police officer was "only marginally relevant, if relevant at all, while the risk of jury confusion [was]

significant.” See *Real v. City of Long Beach*, No. CV 14-02831-MWF, 2015 WL 12745790, at *3 (C.D. Cal. Sept. 18, 2015). Similarly, any analysis or decision by BCI or the Ohio Attorney General is irrelevant, unduly prejudicial and confusing to the jury.

F. Social Media Posts and Messages

Defendants should be precluded from introducing any social media posts and messages of both Vincent Palma and Alicia Palma. Plaintiffs respectfully submit that the introduction of such posts and/or messages are not relevant and constitute hearsay and/or speculation.

G. Testimony or suggestions that Vincent Palma was suicidal or was committing suicide by cop.

Defendants should be precluded from referencing or offering any testimony that suggests that Vincent Palma was suicidal or committed “suicide by cop”. Most importantly, Defendant has no expert witness to opine that Vincent Palma was committing suicide by cop. See *Boyd v. City and County of San Francisco*, 576 F.3d 938 (9th Cir. 2009). Furthermore, any suggestions that he was suicidal are speculative at best and not relevant. Speculation about whether Palma was suicidal does not play any role in determining whether Defendant Johns utilized excessive force when shooting and killing Palma.

IV. PLAINTIFF’S WITNESS LIST

1. Melissa Palma
2. Salvatore Palma, Jr.
3. Alisha Palma
4. Angela Futch
5. Deputy Matthew Johns, in case in chief, as if on Cross Examination.
6. Ron Martinelli, Plaintiff’s Expert Witness
7. Lance T. Martini, Plaintiff’s Expert Witness

8. Scott Roder, Evidence Room
9. Pat Mooney, Evidence Room
10. Amanda Foit-Francois
11. James Longer
12. Brain Abbott
13. Dep. Jay Thomas
14. Sheriff William Niemi
15. Det. Brian Rose
16. Det. Leonhard
17. Lt. T. Moisio
18. Dep. Taylor Cleveland
19. Dep. Ted Barger
20. Dep. Jason Francis
21. Dep. Evan Wolff
22. Sheriff William Johnson
23. Dale Arkenburg
24. Officer Shawn Gonzalez
25. Chief Tim Bruckman
26. Officer Joseph Webb
27. Officer James Arnold
28. Special Agent Cory Momchilov
29. Special Agent Lindsay Mussell
30. Special Agent Moran

31. Brad Loudermilk
32. Rob Bernardo
33. Ben Gruber
34. Ashley Row
35. Dr. Kevin Andryc
36. Mary Henning
37. Janie Laine
38. Heather Rice
39. Cameron Platt
40. Riley Platt
41. Henry Gawrys
42. Daniel Hearn
43. Anne M. Cahill, RN
44. Rebecca M. Kisan, RN
45. Rita E. Ledyard, RN
46. Jonathan M. Moldovan
47. Nathaniel McQuay
48. Jacob Podleski
49. Edmundo Reyes Mandac
50. Matthew Krock
51. Dr. David Dolinak
52. Keith King
53. Any and all witnesses called by any Defendants, on Cross-Examination

54. Plaintiffs reserve the right to name and call rebuttal witnesses whose testimony could not have been reasonably anticipated

55. Plaintiffs reserve the right to amend this witness list

V. PLAINTIFF'S EXHIBITS LIST

1. Ashtabula County Sheriff's Report of February 8, 2017, including photographs
2. Geneva-on-the-Lake Police Report for February 8, 2017, including photographs
3. Geneve Police Department Report for February 8, 2017
4. 911 call for February 8, 2017- transcript and recordings
5. Dispatch logs for February 8, 2017
6. Radio traffic for February 8, 2017
7. Ambulance Repost for February 8, 2017- UH Genevea and from Geneva to UH Cleveland
8. University Hospital Geneve records for February 8, 2017
9. University Hospital Cleveland for February 8, 2017
10. Drone photographs taken of the area of the incident
11. BCI Report including diagram of the area showing location of taser cartridges and shots fired, including "Total Station" prepared by BCI of the area
12. Any and all audio recordings obtained from BCI as part of their investigation
13. Additional BCI photographs and diagrams
14. Map Photo of Yard
15. Use of Force Policy of the Ashtabula County Sheriff's Department
16. Protecting Ohio's Families: a law enforcement guide. The Ohio Attorney General Peace Officer Training Academy. ([ohioattorneygeneral.com\Ohio-Peace-Officer-Training: Policing in the 21st Century Resource Guide](http://ohioattorneygeneral.com/Ohio-Peace-Officer-Training: Policing in the 21st Century Resource Guide))

17. Ashtabula County Sheriff's Report of January 20, 2017
18. 911 Call- January 20, 2017
19. Dispatch Records- January 20, 2017
20. Personnel file of Matthew Johns
21. Autopsy Report including photographs
22. Death Certificate of Vincent Palma
23. Animation of the February 8, 2017, including body impact images and ground map
24. Body cam footage of Geneva-on-the-lake Police Officer
25. Keith King Photos of the yard
26. Family photographs of Vincent Palma and DVD from Funeral
27. Funeral Bill for Vincent Palma
28. Medical Bills for treatment to Vincent Palma
29. List of Attorney Fees

/s/ Richard J. Perez

RICHARD J. PEREZ, Esq.
Counsel for Plaintiff

/s/Michael J. Lerner

MICHAEL J. LERNER, Esq.
Counsel for Plaintiff

/s/ Leslie S. Johns

LESLIE S. JOHNS, Esq.
Counsel for Plaintiff

CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiff's Trial Brief has been filed electronically with the Court on this 7th day of November, 2023. Notice of this filing will be sent to the parties by operation of the Court's electronic filing system.

/s/ Richard J. Perez

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